Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition of the People of the	)	
State of California and the	)	
Public Utilities Commission	)	**PR Docket No. 94-105**
of the State of California to	)	
Retain Regulatory Authority	)	
Over Intrastate Cellular	)	
Service Rates	)	

To: The Commission

REPLY TO OPPOSITIONS

The Cellular Resellers Association, Inc. ("CRA"), acting pursuant to Section 1.106(h) of the Commission's rules, hereby replies to the oppositions to CRA's Petition for Reconsideration (the "Petition"). Oppositions were filed by five (5) FCC-licensed cellular carriers in California and two (2) associations which represent their interests.[1/] The opposing parties are referred to jointly herein as the "Carriers."

Introduction

CRA's Petition presents a simple but critical question: What forum has jurisdiction over complaints of intrastate rate discrimination by providers of Commercial Mobile Radio Services ("CMRS"), including the Carriers who oppose CRA's Petition? The

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[1/]The parties filing oppositions are Los Angeles Cellular Telephone Company ("L.A. Cellular"), the Cellular Carriers Association of California ("CCAC"), AirTouch Communications, Inc. ("AirTouch"), GTE Services Corporation ("GTE"), BellSouth, BellSouth Cellular Corp., and Bakersfield Cellular Telephone Company ("BellSouth"), McCaw Cellular Communications, Inc ("McCaw"), and the Cellular Telecommunications Industry Association ("CTIA").

Commission explicitly decided not to answer that fundamental question in its Report and Order in the above-referenced docket. Petition of the People of the State of California, FCC 95-195 (May 19, 1995) ("Report and Order") at ¶ 147. The Commission added, however, that it would address that issue if and when a party provided evidence and argument concerning the need for resolution of the issue.

CRA's Petition is a response to the Commission's invitation. CRA has shown that it is necessary to resolve the issue now rather than "sometime in the future." Report and Order at ¶ 147. CRA's prior comments in the instant proceeding demonstrated that (1) the CMRS market will not be competitive for two years or longer because Personal Communications Services ("PCS"), Enhanced Specialized Mobile Radio ("ESMR") and other new technologies are either non-existent or in nascent stages of development, (2) the Carriers have previously engaged in unreasonable rate discrimination for intrastate service in California, and (3) the availability of the California Public Utility Commission ("CPUC") has provided CRA and its members with a needed forum for relief. CRA therefore asked the Commission to reaffirm the CPUC's ability to continue to dispose of discrimination complaints concerning intrastate service, and, if the Commission rejected that proposal, to have this Commission assume jurisdiction of such complaints.[2/]

[2/]Contrary to CTIA's claim, CRA has not challenged the standard to be applied in reviewing any State petition under

(continued...)

Not surprisingly, the Carriers disagree with CRA's request for reconsideration. They are content to leave the issue unresolved. Uncertainty about jurisdiction leaves the Carriers free to engage in unreasonable rate discrimination against cellular resellers and other subscribers. Cellular resellers, like other subscribers, will thus be trapped in regulatory limbo without effective recourse -- all to the benefit of the Carriers.

The Carriers offer three (3) basic arguments to support that state of regulatory limbo: (1) CRA lacks standing to request reconsideration even though it is a party to the instant proceeding and adversely affected by the Commission's decision; (2) CRA has failed to meet the Commission's stated standard for reconsideration of the issue as articulated in Paragraph 147 of the Report and Order; and (3) there is no regulatory void since resellers (and other members of the public) can register their complaints before the Commission even if they are uncertain whether the Commission has jurisdiction to consider them. None of the Carriers' arguments has any merit.

I. CRA Has Standing

All of the Carriers contend -- with various degrees of conviction -- that CRA lacks standing to seek reconsideration.

[2/](...continued)
Section 332. CTIA Opposition at 7. CRA has merely challenged the factors considered by the Commission in deciding whether a State satisfied the statutory standard. CRA has raised the matter in its Petition only to highlight the importance of the CPUC in chilling and resolving complaints of discrimination in intrastate service.

For example, McCaw observes that California's failure to seek reconsideration means that "the case was closed" because "CRA has no authority to seek for the CPUC the regulatory authority that the CPUC itself has decided to forgo [sic]." McCaw Opposition at 2 (footnote omitted).

McCaw and the other Carriers are wrong. Reconsideration rights are not confined to the CPUC.

Section 405(a) of the Communications Act of 1934, as amended (the "Act"), states, in pertinent part, as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . .

47 U.S.C. § 405(a) (emphasis added). Section 1.106(b) of the Commission's implementing rules mirrors the statutory language: "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition for reconsideration of the action taken." 47 CFR § 1.106(b) (emphasis added).

CRA is a party to the instant proceeding and is clearly aggrieved by the Commission's decision. None of the Carriers claims otherwise. Some Carriers nonetheless contend that the reconsideration rights provided by Section 405(a) of the Act and Section 1.106 of the Commission's rules were limited by the 1993 revisions to Section 332 of the Act. Under this latter theory, the Carriers contend that Congress intended to limit

reconsideration petitions to States since Section 332(c)(3)(B) of the Act only authorized States to file initial petitions. E.g., AirTouch Opposition at 3-4; McCaw Opposition at 4 n.11.

To be sure, Section 332(c)(3)(B) authorized only States to file initial petitions. However, nothing in that section amends Section 405(a) of the Act or Section 1.106 of the Commission's rules. The new language of Section 332(c)(3)(B) refers to "any reconsideration" -- not just reconsideration sought by States. The failure to limit reconsideration rights granted by another section of the same statute is conclusive proof that Congress did not intend to limit reconsideration rights. See Rusello v. United States, 464 U.S. 16, 23 (1983). (Congress is presumed to act "purposely and intentionally" when it fails to limit the application of language in one statutory provision to another provision using the same language).

Nor is there any merit to some Carriers' contention that the relief that CRA seeks is somehow moot because the CPUC chose not to seek reconsideration. According to this latter argument, CRA stands in no different position than an intervenor in a judicial appeal when an appellant dismisses its appeal. Bell South Opposition at 7; McCaw Opposition at 2.

The Carriers are equally wrong on this latter issue. CRA is not in the same position as an intervenor in a judicial appeal. CRA is a party to an agency proceeding and has a right under the Act and the Commission rules to seek reconsideration. The Commission is in a position to provide relief. CRA therefore has

a right to pursue that relief. The Carriers would no doubt be singing a different tune if the Commission granted California's petition and the Carriers felt sufficiently aggrieved to seek reconsideration.[3/]

II. CRA Has Satisfied the Standard for Reconsideration

As several of the Carriers point out, the Commission clearly anticipated receiving petitions for reconsideration on the issue of jurisdiction over intrastate rate discrimination claims. Thus, the Commission stated that it would consider the issue "upon a showing by petitioners that resolution of the issue is necessary to resolve a material issue raised in this record." Report and Order at ¶ 147. CRA has satisfied that standard.

[3/]McCaw's reliance on Radiofone Inc. v. FCC, 759 F.2d 936 (D.C. Cir. 1985), is totally misplaced. That case concerned the Commission's declaratory judgment that a company was a private carrier rather than a common carrier. When the company went out of business, the court of appeals dismissed the case as moot over the objection of the company's competitors, who, as intervenors, expressed concern about the precedential effect of the Commission's decision. Although there was a difference of opinion among the three judges over the reasons the case was moot, all agreed that the case would not have been moot if the Commission's decision would have a direct impact on the parties arguing against mootness. 759 F.2d at 938-41 (Scalia, J.) (case moot where only injury is "mere precedential effect of the agency's rationale"); 759 F.2d at 941 (Wright & Edwards, J.J.) (case moot for reasons set forth in, inter alia, Tennessee Gas Pipeline Co. v. EPC, 606 F.2d 1373, 1380-83 (D.C. Cir. 1979), where decision was mooted because the recurrence of the capacity curtailment plan at issue was "unlikely" to recur). None of the judges ever suggested that an agency matter would become moot because another party in the proceeding -- even the central party -- had not sought reconsideration, especially when, as here, the agency decision would have an impact on the parties pursuing the case. See AT&T v. FCC, 551 F.2d 1287, 1290 (D.C. Cir. 1977) (agency case not made moot by dismissal of underlying antitrust action because "the Commission's order continues to have legal and practical impact on AT&T").

CRA demonstrated that anticipated competition from PCS and wide-area SMR services will do nothing to deter cellular carriers from engaging in unreasonable rate discrimination now and by no means prior to March 1, 1996, the date by which the CPUC estimated there could be meaningful competition. The Carriers criticize CRA for failing to acknowledge that the advent of competition to cellular carriers is having some impact on cellular carriers now. But that impact, to the extent it exists, is confined to reduced rates and accelerated construction schedules. That impact has nothing to do with the ability of cellular carriers to engage in unreasonable price discrimination now. Quite the contrary. Cellular carriers have both the ability and incentive -- particularly in light of impending competition -- to eliminate their only current and meaningful form of competition -- cellular resellers -- through price-based discrimination. If the Commission avoids resolving the question of who has jurisdiction over intrastate rate discrimination complaints, cellular resellers have no effective recourse.

III. A Regulatory Void Exists

The merit of CRA's Petition is perhaps illustrated best by the differing reactions of the Carriers to the question of whether a regulatory void exists. Although the Report and Order clearly states that the issue of jurisdiction over intrastate rate complaints is being deferred, some Carriers insist that the Commission has such jurisdiction. E.g., L.A. Cellular Opposition at 8 ("pending resolution of these wider questions, the

Commission currently has jurisdiction to entertain reseller complaints about [intrastate] discriminatory rates"); AirTouch Opposition at 12 ("the Commission now has jurisdiction over intrastate CMRS rates"). Other Carriers disagree, acknowledging that there is uncertainty and suggesting that it be resolved if and when a complaint of intrastate rate discrimination is filed with the Commission. E.g., CCAC Opposition at 12-13 (Commission could "address the jurisdictional issue at such time as a party filed a formal or informal complaint").

The issue before the Commission, then, is ripe for resolution. If Carriers like L.A. Cellular and AirTouch are correct, the Commission should simply confirm that it has jurisdiction and will expeditiously dispose of complaints concerning intrastate rate discrimination. On the other hand, if Carriers like CCAC are correct, then the Commission should eliminate the ambiguity. Otherwise the Commission will undermine rather than promote competition. In the absence of clarification, there will be delay in resolution that will only protect the Carriers. And if the resolution is against this Commission's exercise of jurisdiction, the complainant will have lost valuable time and perhaps the opportunity for effective relief in another forum. Parties should not be forced to proceed in that kind of regulatory limbo.

Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission reconsider its decision in the above-referenced matter and authorize the CPUC to retain jurisdiction over unreasonable discriminatory practices involving intrastate service or, in the alternative, assume jurisdiction over complaints involving such matters.

Respectfully submitted,

KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(202) 789-3400

By: 
Lewis J. Paper
David B. Jeppsen

PETER A. CASCIATO,
A PROFESSIONAL CORPORATION
Suite 701
8 California Street
San Francisco, CA 94111
(415) 291-8661

By: 
Peter A. Casciato

Attorneys for Cellular Resellers Association, Inc.

CERTIFICATE OF SERVICE

I, Tracy Holden, do hereby certify that a copy of the foregoing has been delivered this 17th day of July, 1995, by first-class United States mail, postage prepaid, to the following:

Hon. Reed E. Hundt*
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Hon. James H. Quello*
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Hon. Andrew C. Barrett*
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, DC 20554

Hon. Susan Ness*
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Regina M. Keeney, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, D.C. 20554

Michael Wack, Deputy Chief*
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 644
1919 M Street, N.W.
Washington, D.C. 20554

Dan Phythyon, Sr. Legal Assistant*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Ellen S. LeVine
State of California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Attorneys for the People of the State of California and the Public Utilities Commission of the State of California

Joel H. Levy
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for National Cellular Resellers Association

David A. Gross
AirTouch Communications
1818 N Street, N.W.
Washington, D.C. 20036
Attorneys for AirTouch Communications

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorney for American Mobile Telecommunications Association, Inc.

David A. Simpson
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, California 94101
Attorney for Bakersfield Cellular Telephone Company

Adam A. Anderson
Bay Area Cellular Telephone Company
651 Gateway Boulevard
Suite 1500
San Francisco, California 94080

Richard Hansen, Chairman
Cellular Agents Trade Association
11268 Washington Blvd.
Suite 201
Culver City, California 90230

Michael B. Day
Wright & Talisman, P.C.
100 Bush Street, Shell Building
Suite 225
San Francisco, California 94104
Attorney for Cellular Carriers Association of California

Michael F. Altschul
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Thomas H. Bugbee
Chief, Regulatory Affairs
County of Los Angeles
Internal Services Department
Telecommunications Branch
P.O. Box 2231
Downey, CA 90242
Attorney for County of Los Angeles

Russell H. Fox
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
Attorney for E.F. Johnson Company

Howard J. Symons
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Avenue. N.W.
Washington, D.C. 20004
Attorney for McCaw Cellular Communications, Inc.

Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorney for Mobile Telecommunications Technologies Corp.

Jeffrey S. Bork
U.S. West Cellular of California, Inc.
1801 California Street
Suite 5100
Denver, Colorado 80202

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
Attorney for Nextel Communications, Inc.

Mark J. Golden, Vice President
Personal Communications Industry Association
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036

Michael Sharnes
1717 Kettner Blvd.
Suite 105
San Diego, California 92101
Attorney for Utility Consumer's Action Network and Towards Utility Rate Normalization

Judith St. Ledger-Roty
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
Attorney for Paging Network, Inc.

Douglas B. McFadden
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
Attorney for GTE Services
Corporation on behalf of Its
Telephone and Personal
Communications Companies

Katherine T. Wallace
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107
Attorney for Los Angeles Cellular
Telephone Company

Tracy Holden

* By hand delivery